only be addressed by a greater security of 'place' and the creation of meaningful jobs for Indigenous communities.

2. Remote communities consider the lack of life experience of living in remote landscapes by people recommending or making decisions and the lack of appropriate process to integrate remote area experience and knowledge to be the cause of perverse policy. Remote areas across Australia are generally in a state of economic decline, yet through law, governments are cost-shifting economic responsibility for environmental policy to some of Australia's most socio-economically disadvantaged communities. Decisions that result from the advocacy of those with conservation ideals come at no personal cost, but rather shift the cost to other people who are isolated from the decision.

3. The 'conservation economy' is only one stage or component contributing towards long term sustainability.

4. The real agenda of the environmental groups who support the *Wild Rivers Act 2005* (WRA) is one of extremely limited development. While different groups have changed their position and/or involvement with Wild Rivers legislation over time, it is apparent that overall they have clearly had more success in Queensland than perhaps even they envisioned, as evident in an earlier policy document of the Australian Conservation Foundation (ACF) that envisaged fewer rivers preserved within national parks. The approach adopted in Queensland goes much further than protection of river systems within other jurisdictions, both domestically and overseas. Consequently the potential for a negative impact is much greater.

5. The implementation of the WRA suggests that the Queensland Government has not got its priorities right. Ecologists and environmentalists likewise arrive at positions which fail to include the people affected by such positions in terms of the processes used (eg. lack of consent). Having excluded them from the process, they then fail to take into account their particular circumstances. Part of this problem stems from the fact that in implementing the *Sustainable Planning Act 2009*, there are no defined boundaries for applying the concept of 'ecological sustainability'. By failing to apply the relevant criteria at a regional level, they ignore that fact that local communities may be living in poverty and that it is the development needs of local communities which should take precedence in determining whether an activity is sustainable.

6. Legislation should not be as prohibitive as the *Wild Rivers Act 2005 (WRA).* Existing environmental regulation (or amendments to it where necessary) is sufficient to protect river systems. On this basis the WRA should be revoked. Failing this, we would support the *Wild Rivers (Environmental Management) Bill 2010*, as the second best outcome.

7. A 'consultative approach' does not equate to 'consent'. To the extent that there are some who would argue otherwise, this needs to be challenged.

8. The *Wild Rivers (Environmental Management) Bill 2010* is intended to operationalise the principle of consent through the *Native Title Act 1993*. Without it, the WRA runs up against access rights, exclusive possession rights and rights to occupy and live on the land. In doing so, it is counterproductive to recent measures adopted which aim

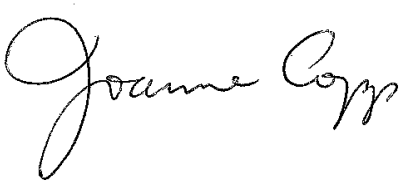
to create a more flexible native title system and one that produces broad benefits to Indigenous people.

Yours Faithfully,

Ms Noeline Gross

Ph: 0427 139 784
PO Box 63
Georgetown. Qld 4871

Dr Joanne Copp



Ph: 0402 547 876
102 Prior Street, Tarragindi
Queensland, 4121

Inquiry into Issues Affecting Indigenous Economic Development in Queensland

House Standing Committee on Economics

Submission on behalf of Ms Noeline Gross and Dr Joanne Copp.

February 2011

Table of Contents

Executive Summary

This submission is based on life and work experience associated with the landscapes and people within Wild River Declarations, extensive academic research and community feedback. We wish to contribute these relevant points of view regarding the *Wild Rivers (Environmental Management) Bill 2010.*

The environmental intentions and sustainable development needs of Indigenous and remote people are not served by the *Wild Rivers Act 2005*. Environmental needs for such systems may be adequately met by either existing or amended environmental regulation, including higher level legislative protection, where and if required, and land use planning mechanisms at either the State or Commonwealth level. Thus we suggest the *Wild Rivers Act 2005* be revoked.

Best practice principles and procedures for international convention and Australia's EPBC Act clearly articulate the need for mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources. Consent between an entity [government or other] wishing to instigate change and those impacted economically, socially or culturally by the change is also important.

The 'conservation economy' is not a solution on its own, but rather only a component or stage contributing towards long term sustainability.

Through law, governments are cost-shifting economic responsibility for environmental policy to some of Australia's most socio-economic disadvantaged communities without any consent processes. Essentially people who have conservation ideals are advocating for or developing policy and law in the absence of good knowledge and experience, at the appropriate scale to achieve the ideal. Decisions that result from this advocacy come at no personal cost, but rather shift that cost to other people who are isolated from the decision.

The process of creating new environmental legislation needs to be improved with the following:

- Regulatory systems that make better use of available scientific and local practical knowledge inclusive of Indigenous peoples and other landholders, and in order to minimise bias in environmental decisions, are assessed by an independent authority.
- Green and white paper processes are used to assess whether legislation is the appropriate tool.
- Regulatory cost-benefit, and social impact analysis is mandatory in the creation of new environment law and that regular assessment of regulatory systems for their impacts on civil liberties, costs at both the administrative and community level, and the rule of law are monitored.
- That disproportionate cost at the community level are fairly negotiated and compensated with a right of appeal process.

We believe that in creating the *Wild Rivers Act 2005* all points above were neglected or insufficient.

It is important that one has a good sense of what is needed in Indigenous communities in North Queensland when assessing the merits of the *Wild Rivers (Environmental Management) Bill 2010.* While these communities are very heterogeneous, they do all share

a common need: *the need for meaningful jobs*. The terms of reference for this inquiry appear to recognise this need. The implication of this is that, in this particular context, compensation is not necessarily an appropriate solution, as it compounds existing problems associated with passive welfare and dependency.

Increasingly economic disadvantage is escalated by the dysfunction of a variety of perverse law and government programs across a range of intent. The cumulative impact of a wide variety of unnecessary legislative impost and stop start stop government programs plays a substantial role in stifling economic and social growth in remote areas limiting long term sustainable futures. This is exacerbated by the under representation of Indigenous and remote communities in legislative process.

Conservation economies are emerging in remote areas, however environmental law such as the *Wild Rivers Act 2005*, is currently disadvantaging full uptake of these new economies. For instance, land managers in Wild River areas will not be able to participate in the proposed Emissions Trading Scheme and earn income for vegetation management.

The *Wild Rivers (Environmental Management) Bill 2010* affords important protection to Indigenous rights. To the extent that access rights are impacted, then it is important to seek consent. The *Wild Rivers (Environmental Management) Bill 2010* proposes to operationalise the principle of consent through the *Native Title Act 1993,* honouring these connections in keeping with the definition of a 'right' as a '*just claim* or title, whether *legal, prescriptive or moral'.*

Following the release of the 2005 report *Structures and Processes of Prescribed Bodies Corporate* (PBC)*,* the Australian Government accepted in full all of the recommendations with the exception of Recommendation 5. Under this recommendation, PBCs should only consult and obtain the consent of native title holders on matters concerning the surrender of native title rights and interests in relation to land and waters. However, the Government considers that this would be disadvantageous to common law holders of native title and believes that "the requirement to consult and obtain the consent of native title holders in relation to *all native title decisions* should generally be retained."

A 'consultative approach' does not equate to consent. While there may be some degree of debate about the extent to which undertaking consultations in good faith is sufficient, this "inconsistency" should perhaps be challenged. This viewpoint does not seek to underplay the importance of effective consultation, and in particular, the benefits of deliberative dialogue for good process around environmental management. Instead, it highlights the fact that important legal and moral rights are violated when consent is not reached.

While there is clearly disagreement in society about what rights are captured by "native title", recent trends towards greater flexibility and scope for native title determinations suggests that continuing to define them as "traditional interests" is inconsistent with the view expressed by the Attorney General in March 2009 that *"native title is about more than just delivering symbolic recognition – it is an opportunity to create sustainable, long-term outcomes for Indigenous Australians."*

Introduction

The *Wild Rivers (Environmental Management) Bill 2010* provides in s.5 that the development or use of Aboriginal land in a wild river area cannot be regulated under the relevant Queensland legislation unless the owner agrees in writing. The purpose of the Bill is to ensure that the State does not regulate Aboriginal landholders and native title holders without their agreement. This is important as under the United Nations Declaration on the Rights of Indigenous Peoples to which Australia is a signatory, *"Governments shall consult and co-operate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."*

We interpret that this bill will not overturn the existing declarations and these will continue to stand, however they will not regulate native title land or Aboriginal land without the agreement of the native title holders/Aboriginal land holders. In relation to land which is neither native title land nor Aboriginal land, then the wild river declaration would continue to apply.

We interpret that Native title land will include both determinations and registered claims. Where land is native title land, the identity of the native title holders will be established through the Indigenous Land Use Agreement (ILUA) process and the anthropology necessary in this process. In relation to Aboriginal land, then the land will normally be held by a land trust and it will be the land trust that would be required to sign-off on an agreement. This is not uncommon, as for many matters on Cape York, where both a native title agreement and the agreement of the land trust are obtained.

We believe that the implementation of the *Wild Rivers Act 2005* breaches basic human rights and good governance not only through the United Nations Declaration on the Rights of Indigenous Peoples, but a raft of principles/objectives underpinning a range of international and domestic declarations, conventions, good legislative procedure and national resource management (NRM) governance guidelines. This submission highlights some of these, in addition to suggesting improvements for regulating free flowing river systems in these northern regions. Such arguments underpin our support for the *Wild Rivers (Environmental Management) Bill 2010.* However, such support should not override the fact that the sustainable development needs of Indigenous communities on Cape York Peninsula (CYP) would best be served by revoking the Wild Rivers Act 2005. Environmental needs for such systems may be adequately met by either existing or amended environmental regulation, including expansion of biodiversity offsets, where and if required.

The Convention on Biological Diversity (CBD), Rio de Janeiro (1992) (signed 29 December 1993) explicitly states that:

> *"economic and social development and poverty eradication are* ***the first and overriding priorities*** *of developing countries"*

which, while stated in a different context, sheds light on the need for prioritisation of different rights or values. While in some circumstances, the needs of the environment and development may align (eg. 'conservation economy'), this will not be universal. The effectiveness of regulation often depends on how it deals with tension between competing values.

The importance of such prioritisation is highlighted by the August 2010 *Concluding Observations of the Committee on the Elimination of Racial Discrimination* (CERD) under article 9 of the convention when it states:

> *"that the Committee regrets the ...slow implementation of the principle of Indigenous peoples' exercising meaningful control over their affairs (arts. 1,2)";*

and

> "*reiterates its serious concern about the continued discrimination faced by Indigenous Australians in the enjoyment of their economic, social and cultural rights (art 5).*

The [CERD] Committee recommends the following:

- that the State party [i.e. relevant government] dedicate sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system;
- that all initiatives and programs in this regard ensure the cultural appropriateness of public service delivery and that they seek to reduce Indigenous socio-economic disadvantage while advancing Indigenous self-empowerment;
- that the State party [i.e. relevant government] enhance adequate mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources;[1]
- that the State party [i.e. relevant government] consider the negotiation of a treaty agreement to build a constructive and sustained relationship with Indigenous peoples.

It is also instructive to know that at the International Union for the Conservation of Nature's (IUCN's) IVth World Conservation Congress (WCC) in October 2008 in Barcelona, IUCN members also took decisions *"upholding standards for free, prior and informed consent"*. Indeed IUCN has a clear policy to promote respect for the free, prior informed consent of Indigenous peoples in relation to the interventions of the private, public and NGO sectors which may affect the lands, territories and resources of Indigenous peoples, and consistently promotes this principle in its relationships with these sectors.[2] In addition, one of the recommendations stemming from the Permanent Forum on Indigenous Issues in May 2009 was:

---

[1] The International Labour Organisation Convention No. 169 argues that:

- Indigenous peoples have the right to the natural resources existing on their lands, including the right to the participation, use, management and conservation of these resources. (Article 15 of Convention No. 169);
- The objective of the consultation should be to achieve agreement or consent, where the goal of the parties should be agreement or consent, and genuine efforts need to be made to reach an agreement or achieve consent. This qualitative requirement is closely and inherently linked to the requirement that consultations be carried out in good faith. (Article 6 (2) of the Convention)

Note that there is in fact a degree of inconsistency inherent in these two points. Discussions with practitioners conferred with this view, and stated that to the extent there is an inconsistency, it is the latter point (i.e. Article 6(2)) which should perhaps be challenged/changed.

[2] "Applying a Rights-Based Approach to Indigenous Peoples in Conservation", speech by Annelie FINCKE, presented at the Eighth Session of the UN, Permanent Forum on Indigenous Issues (UNPFII) New York 18-29 May 2009 and email correspondence with the International Union for Conservation of Nature, 25 August 2010.

"*We urge the development of a mechanism to support Indigenous peoples' incorporation of distinct indicators of human development that would include legally recognized access to land and territory."*

The *Wild Rivers (Environmental Management) Bill 2010* would clearly produce a better outcome in line with the international conservation community. It is probable that most environmental organisations within Australia would also support the intent of this bill. For example, the Australian Conservation Foundation (ACF) states on its website that it supports changes which:

"Provide a consent mechanism, whether through an Indigenous Land Use Agreement or other process."

This submission is selective in the terms of reference which it seeks to address. In particular, it focuses on the following:

A. *The potential for industries which promote preservation of the environment to provide economic development and employment for Indigenous people;*
B. *Options for improving environmental regulation for such systems [free-flowing river systems which have much of their natural values intact]; and*
C. *The impact of existing environmental regulation, legislation in relation to mining and other relevant legislation on the:*
    I. *exercise of native title rights; and*
    II. *on the national operation of the native title regime*

and the impact which legislation in the form of the Wild Rivers (Environmental Management) Bill 2010 would have on these matters.

Part A - The potential for industries which promote preservation of the environment to provide economic development and employment for Indigenous people

The conservation economy is recommended for adoption as a solution to enhancing Indigenous Economic Development by many academic and government sources. It is our belief that the 'conservation economy' is not a solution on its own, but rather only a component or stage contributing towards long term sustainability.

Many opportunities to develop the 'conservation economy' do exist, however the generation of revenue from such enterprise to date is marginal and still reliant on external funding support. Thus we cannot support 'boxing' Indigenous people's into a stereotypical economic model as the sole answer to achieving 'real life' economic development, employment and improved personal wealth. We wish to ensure that we are not limiting the rights of remote and minority communities to choose between a variety of economic development opportunities through unintended 'academic discrimination' or oppressive legislation.

We believe that strategic and business plans prepared by Indigenous and remote communities strongly indicate two common desires:

1. The desire to self determine futures or at minimum have active participation in decisions that impact futures and livelihoods.
2. The desire to be a part of the 'real world' economy with 'real and equitable wealth'.

Decision Making

Within the rangelands of Australia and much of Northern Australia the populations are remote and have comparatively high representation of Indigenous peoples. However within political, bureaucratic, media and academic spheres remote and Indigenous people are substantially under-represented. Thus the capacity to integrate the wealth of environmental knowledge, practical solutions, culture and mood of these areas into critical decisions and debate is disproportionate. The result of this under representation is a high percentage of perverse outcomes generated by well intentioned law, policy and programs.

Through law, governments are cost-shifting economic responsibility for environmental policy to some of Australia's most socio-economic disadvantaged communities without any consent processes. Essentially people who have conservation ideals are advocating for or developing policy and law in the absence of good knowledge and experience, at the appropriate scale to achieve the ideal. Decisions that result from this advocacy come at no personal cost, but rather shift that cost to other people who are isolated from the decision.

The common law principle is that those who cause damage to others must pay for reparation but beyond that if individuals are asked to sacrifice property for the benefit of all society, the cost of that sacrifice must be borne by society.

"the duty to compensate owners for property taken for public purposes is a principle of justice. The cost of public benefit must be met by the public, and not by individual owners whose property is taken".[3]

The promotion of preservation or conservation of the environment would less likely create perverse impact where:

- Regulatory systems make better use of available scientific and local practical knowledge inclusive of Indigenous peoples and other landholders, and to minimise bias in environmental decisions, are assessed by an independent authority.
- Green and white paper processes are used to assess whether legislation is the appropriate tool.
- Regulatory cost-benefit, and social impact analysis is mandatory in the creation of new environment law and that regular assessment of regulatory systems for their impacts on civil liberties, costs at both the administrative and community level, and the rule of law are monitored.
- That disproportionate cost at the community level are fairly negotiated and compensated with a right of appeal process.

Equitable Wealth

Remote and Indigenous communities, like all other people, wish to have the opportunity to establish a good wealth - lifestyle balance. These are basic human rights. People in these communities do wish to pursue economic development and employment opportunities to help build the social and economic fabric of their communities.

The economic disadvantage in remote areas is partly a function of the culture of the remote communities and of the remoteness of those regions including the lack of infrastructure and services that augment economic potential. However, increasingly economic disadvantage is escalated by the dysfunction of a variety of perverse law and government programs across a range of intent. A simple example is the obligations placed on landholders to conform to the *Water Act 2000* for referrable dams. The intent of the legislation is to protect life and property below dams exceeding volume and wall height benchmarks. No-one disagrees with the intent of the legislation. However, in order to conform under the act referrable dams must be on-site assessed every five years by a Registered Professional Engineer of Queensland (REPQ) engineer, regardless of the location of the dam. In remote areas most dams have no potential impact on life or property on residents downstream, as in many instances there are no residents within an impact zone. Regardless, by law remote people must have dams assessed (even if they have zero threat) every five years. The costs of engaging an engineer for site inspections in remote areas are up to five fold the cost (several thousand dollars extra per dam) for the same service in rural and urban areas.[4]

Much of the employment in Indigenous communities is associated with government grants or programs. The cumulative impact of a wide variety of unnecessary legislative impost and

---

[3] http://propertyrightsaustralia.org/speeches/suri-ratnapala/

[4] Another new regulation that remote communities cannot afford is the *Animal Management (Cats and Dogs) Act 2008*. Again the costs to conform in remote communities are excessive in comparison to less remote areas and in fact most areas cannot practically meet the legislative obligations recently imposed.

stop start stop government programs plays a substantial role in stifling economic and social growth in remote areas limiting long term sustainable futures.

Land/property is considered the foundation of economic development in remote areas that to date mainly derive income from resource based industries. Property rights for non-Indigenous people in remote Australia are continually declining under environmental laws, however the property or land rights of Indigenous people with a determination of non-exclusive native title, or no native title determination, are even further limited.

Working in partnership Indigenous and non-indigenous remote communities need opportunity to identify solutions for the acquisition of alienable indigenous freehold title in order to assist people transition from dependency towards 'real' economic development and 'real and equitable wealth'. The economic potential and personal wealth of Indigenous communities is influenced by the state of affairs of the wider infrastructure, businesses, community and industries as a whole. Thus, it is reasonable to suggest that legislative impost to the wider economies in remote areas indirectly impacts Indigenous employment.

Communities and industries that are able to generate secure and reliable wealth are best positioned to plan and action long term sustainability – including cultural and environmental health.

The Conservation Economy in Practice

Ecosystem services are defined as the aspects of ecosystems utilised (actively or passively) to produce human wellbeing (Fisher *et al.* 2008)[5] which is consistent with the widely accepted Millennium Ecosystem Assessment (MA 2005)[6].

The resources that underpin the provision of ecosystem services can be summarised as 'natural capital', with ecosystem services representing the 'steady flow of interest' which humanity derives from natural capital[7].

Ecosystem services include products derived from our natural resources such as agriculture and fisheries, but also tourism and increasingly new markets associated with conservation such as land purchases by Bush Heritage. Private markets, but largely those facilitated by government, are emerging where the maintenance or improvement of natural capital and associated ecosystem services can be remunerated by paying resource managers for active environmental management and stewardship[7].

Tourism is often promoted as part of the conservation economy and a new market for Indigenous economic development and the revenue generated by tourism in the Northern territory based on the natural capital of the area is highlighted and a successful example. However, while there are economic benefits associated with more tourists, there can also be costs to destinations in the form of negative environmental and social impacts. Increasing

---

5 Fisher, B., Turner, R. K., and Morling, P. (2008). Defining and classifying ecosystem services for decision making. Ecological Economics 68, 643–653. doi: 10.1016/j.ecolecon.2008.09.014.

6 MA (Millennium Ecosystem Assessment) (2005). 'Ecosystems and Human Well-being: Biodiversity and Synthesis.' (World Resource Institute: Washington, DC.).

7 Ehrlich, P. R., and Ehrlich, A. H. (2004). 'One With Nineveh: Politics, Consumption, and the Human Future.' (Island Press: Washington, DC.).

visitor numbers are straining not only the very environmental assets that attract tourists, but also the host communities[11].

In the Gulf of Carpentaria, in particular, recreational fishing-based tourism is highly consumptive of natural resources. Tourists take fish in numbers that rival and, for some species, even exceed the harvest of commercial fisheries. While individuals may well stay within legal possession limits, the aggregate and cumulative impact of this level of resource extraction is as yet unknown. However, the socially most disadvantaged sections of the host population, specifically the indigenous population, are particularly affected by shops inflating prices during the tourist season and the single ambulance in the Gulf of Carpentaria region being tied up with emergencies of a majority elderly tourist population. There are also disparities in the distribution of economic benefits from tourism between the indigenous and non-indigenous sections of host populations, with very limited direct involvement of the Indigenous population in tourism. Seasonal tourist workers even compete for (unskilled) jobs during the tourist season. This is an indicator of inequalities in the distribution of net social benefits from tourism within regional communities.

It should not be assumed that tourism is an answer to the economic impoverishment currently experienced by Indigenous peoples. Additionally legislation has further inhibited some Indigenous tourism developments such as that at Delta Downs Station in Carpentaria Shire. The Kurtijar community holds the grazing lease of this property which includes an extensive coastline in the Gulf of Carpentaria. Illegal fishermen regularly use and abuse this coastline. A ranger program was established in part to police the illegal use and abuse of the property's coastline and fish resources to be funded by legitimate camping fees payed by tourists. The ranger program had to be cancelled in part because under the Queensland *Land Act 1994* the property was only allowed to generate 'grazing' revenue and no tourism development or income could be entered into without firstly progressing a material change of use of the property. At the time of writing, now several years since the program was cancelled, still no regulated tourism to generate revenue for rangers is allowed by law.

Under the Commonwealth Government's National Reserve Program aligned with the Indigenous Land Corporation (ILC) program there is potential for Indigenous to acquire land for conservation purposes and generate revenue within that reserve so long as the activities are consistent with the conservation outcomes of the reserve. Ultimately conservation requires management and management costs money. In the Gulf of Carpentaria the Ewamian Aboriginal Group have for over two years attempted to progress the purchase of a suitable property under such a scheme and has developed a business plan based on a variety of revenue generation. This type of conservation approach is far more preferable than the existing National Park approach or legislative enforcement for environmental duty of care. This is because it does not remove the economic potential to the community from the property in question, whilst still achieving the desired public environmental outcome. However, evidence suggests that significant government or public donations are required by such conservation orientated properties as few self generate sufficient income for self funding in remote areas.

Another emerging payment for ecosystem services is the proposed emissions trading scheme whereby properties that sequester or store carbon reserves are able to trade in a market system to generate an annual financial return. However, much of remote

Queensland is unable to engage in such markets or payments for ecosystem services for legislative reasons, being:

1. The local community does not own the carbon, it is owned by government as the majority of land is leasehold.
2. Legislation such as Wild Rivers and the Vegetation Management Act enforce the 'protection' of the vegetation thereby removing the opportunity for remote property holders to voluntarily store carbon and receive income for such arrangements.

Many graziers across Australia's tropical savannas are driven in their profession and their actions by a very strong stewardship ethic. These farmers are more strongly motivated by stewardship aspirations than by economic and social goals[6]. Thus, a legislative approach can 'crowd out' goodwill to the point that the motivation to participate freely in conservation is lost.

A successful example of a program utilising existing goodwill is the Nature Assist Program in Queensland where to date 2.1 million hectares are gazetted and a further 2 million hectares is under negotiation. The uptake is particularly strong in remote areas. This program works 'with' people to achieve an outcome that is then recognised under the existing *Nature Conservation Act 1992.*

Policy design that considers 'soft values', takes advantage of landholders' [including Indigenous peoples] intrinsic motivation for conservation and facilitates altruistic behaviour may therefore be more effective than policy that ignores these factors[8].

The Wild River Ranger program and other ranger programs such as the Working on Country program is another typical form of the conservation economy where through government grants there is payment for ecosystem services employing largely Indigenous people.

Looking after Country Together is a whole-of-government strategic policy framework which has as its vision that "by 2011, Aboriginal and Torres Strait Islander Queenslanders will have more opportunities to access and manage their traditional land and sea country." Initiatives emerging from this include:

- Wild Rivers Rangers Program
- Supporting Animal Management in Aboriginal and Torres Strait Islander local governments
- Alliance Model
- Land Trust Capacity Building Program
- Vegetation Management Pilot Projects – native forests management -
- Pilot training and employment programs

Table 1 lists the number of Indigenous jobs currently created under these programs.

[8] M., Gowdy, J., 2010. The evolution of social and moral behaviour: evolu- tionary insights for public policy. Ecological Economics 69, 753–761.

Table 1: Government Funded Employment Initiatives - Cape York Peninsula and Gulf (as at 31/01/11)			
Program	**Agency**	**Number of Participants**	**Comments**
Wild River Ranger Program	DERM	40	
Land Trust Capacity Building Program	DERM	54	
LACT Pilot Training Projects	DERM	81	5 Projects throughout QLD
Vegetation Management Pilot Projects (Native Forests Management)	DERM	0	No participants as the project could not progress due to a number of issues.
Alliance Model	DTMR	34	4 - Wills Alliance Project 30 - Myuma Alliance Project
Supporting Animal Management in ATSI Local Govt	QLD HEALTH	69	42 - Completed Training 27 - Currently in training

Source: Queensland Government, Dept of Environment and Resource Management, Aboriginal and Torres Strait Islander Services

These numbers are relatively small when considered in the context of the overall level size of the current and future labour force within these regions. Cape York Peninsula has a combined ERP (2009 provisional) of 14,437, accounting for approximately 0.3% of the total Queensland population.[9]

The Working on Country program however is restricted to Indigenous Owned land, thus excluding participation by Indigenous Groups who do not own land – the majority. These programs generally provide capacity for rangers to work in the landscape on environmental projects such as pest control, ghost net removal, and in some cases environmental monitoring. There are limited career pathways with these jobs.

One of the benefits of the Wild River Ranger program is that rangers build partnerships with non-indigenous landholders for the management of environmental risks. This contributes to a wider 'on-farm' conservation opportunity where lands outside of conservation reserves also contribute towards conservation outcomes. The relationships between Indigenous and non-Indigenous locals are extremely important and can lead to agreed additional cultural and commercial opportunity for Indigenous people, including extra employment.

Where ranger programs are managed by Indigenous groups or other community based organisations there is also potential that as skills develop these ranger centres can provide additional commercial services or fill human resource gaps in demand in remote areas to the agricultural, mining and tourism industries. Ranger programs such as these should be expanded and integrated into filling the science gaps in remote areas. For example remote areas have a significantly large paucity of weather data particularly rainfall and river discharges. Yet good planning for future economic development should be based on reliable weather data to mitigate natural disasters etc. Also soil type is poorly known.

[9] SLAs include: Aurukun (S), Cook (S), Hope Vale (S), Kowanyama (S), Lockhart River (S), Mapoon (S), Napranum (S), Weipa (T), Northern Peninsula Area (R) -Injioo, Northern Peninsula Area (R) - New Mapoon, Northern Peninsula Area (R) – Umagico, Pormpuraaw (S), and Wujai Wujai (S). There are 42 SLAs in total in the statistical subdivision Far North SD Balance. Source: ABS Regional Population Growth, Australia, Catalogue Number 3218.0 and a Concordance File of 2009 SLA to 2006 Indigenous Region (IREG).

Commonwealth investments in science and science infrastructure typically goes to institutions that do not service remote areas at landscape scales nor do they integrate with local communities. It would be a strategic investment in our futures to engage the local indigenous and non-indigenous remote area population through ranger and science programs to formally construct the climate and soils knowledge of remote areas to inform decision making – especially in Northern Australia.

Part A Conclusions

The 'conservation economy' is not a solution on its own, but rather only a component or stage contributing towards long term sustainability.

Due to the under representation of Indigenous and remote communities in legislative process there is a high percentage of perverse outcomes generated by well intentioned law, policy and programs.

Through law, governments are cost-shifting economic responsibility for environmental policy to some of Australia's most socio-economic disadvantaged communities without any consent processes. Essentially people who have conservation ideals are advocating for or developing policy and law in the absence of good knowledge and experience, at the appropriate scale to achieve the ideal. Decisions that result from this advocacy come at no personal cost, but rather shift that cost to other people who are isolated from the decision.

The process of creating new environmental legislation needs to be improved with the following:

- Regulatory systems make better use of available scientific and local practical knowledge inclusive of Indigenous peoples and other landholders, and to minimise bias in environmental decisions, are assessed by an independent authority.
- Green and white paper processes are used to assess whether legislation is the appropriate tool.
- Regulatory cost-benefit, and social impact analysis is mandatory in the creation of new environment law and that regular assessment of regulatory systems for their impacts on civil liberties, costs at both the administrative and community level, and the rule of law are monitored.
- That disproportionate cost at the community level are fairly negotiated and compensated with a right of appeal process.

We believe that in creating the *Wild Rivers Act 2005* all points above were neglected or insufficient.

Increasingly economic disadvantage is escalated by the dysfunction of a variety of perverse law and government programs across a range of intent. The cumulative impact of a wide variety of unnecessary legislative impost and stop start stop government programs plays a substantial role in stifling economic and social growth in remote areas limiting long term sustainable futures.

Conservation economies are emerging in remote areas, however environmental law such as the *Wild Rivers Act 2005*, is currently disadvantaging full uptake of these new economies. For instance, land managers in Wild River areas will not be able to participate in the proposed Emissions Trading Scheme and earn income for vegetation management.

Part B - Options for improving environmental regulation for such systems

We believe that a misapplication of the precautionary principle is facilitating legislators, with support from some ecologists and environmentalists, to push a very limited or anti-development agenda within Cape York Peninsula and the Gulf via Wild Rivers legislation. The *Wild Rivers Act 2005* is a marked shift away from environmental strategies underpinning other environmental legislation aimed at achieving ecologically sustainable development. We suggest that part of the problem also stems from the failure to apply the criteria for "ecological sustainability" at a regional level, as opposed to a national or global level.

We believe that the effectiveness of the wild rivers legislation in protecting river systems with their natural values intact and the *Sustainable Planning Act 2009* in bringing about ecologically sustainable development is also limited. Consequently, we believe that a better option for improving the environmental regulation of such systems is to rely on the existing environmental regulations (with amendments or expansions as required).

Precautionary Principle

The Convention of Biological Diversity 1992 states:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Principle 15)"*

In a submission to the 2010 Senate Inquiry into the *Wild Rivers (Environmental Management) Bill 2010,* Sinclair argues that in applying the precautionary principle, there should be a scientific evaluation of the risks *associated with activities*, rather than an indiscriminate prohibition of certain activities regardless of any environmental impact assessment.[10] She argues that such legislation "*is blind to both [the] scale and practice of potential activities".* In addition, to the extent that following exemptions:

- an environmental impact statement shows that natural values will be preserved;
- the state considers the project to be of state significance; or
- the value of the natural resource is sufficient to warrant a lease in the waterway.

are provided for mining activities in high preservation areas and nominated waterways, State and mining interests are placed over the potential interests of traditional owners.

In *Telstra Corporation Limited v Hornsby Shire Council* held in the NSW Land and Environment Court, Preston J. argued that the precautionary principle and accompanying need to take precautionary measures is "triggered" when two prior conditions exist: a threat of serious or irreversible damage, and scientific uncertainty as to the extent of possible change. Once both are satisfied:

[10] Submission by Melissa Sinclair 2010 to the Senate Inquiry into the Wild Rivers (Environmental Management) Bill 2010.

"a proportionate precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate...The principle should not be used to try to avoid all risks."

Further, he argued that five factors should be considered:

I. the scale of the threat (local, regional etc);
II. the perceived value of the threatened environment;
III. whether the possible impacts are manageable;
IV. the level of public concern; and
V. whether there is a rational or scientific basis of the concern.

There is a fallacy in extrapolating possible risk of a proposed action, without examining equally closely, the possible risks of *not* acting.[11] Policy-makers tend to apply the precautionary principle to that proposal, while assuming the alternatives to be risk-free. For example, in adopting a very limited development stance, a negative consequence is that many rivers are overrun with introduced weeds.

Effectiveness of Wild Rivers Legislation

The *effectiveness* of legislation is assessed by how well a strategy has produced or helped to produce the intended result.[12] The purpose of the *Wild Rivers Act 2005* is stated in s3 as follows:

"The purpose of this Act is to preserve the natural values of rivers that have all, or almost all, of their natural values intact."

Therefore, in order to address the effectiveness of the Act, one must ask:

I. Does the WRA in fact achieve its objectives?
II. Could these objectives be achieved without the WRA and if so how?

It is often assumed that rivers have been declared "wild" due to their pristine state. However, this is often far from the truth, with a large number of introduced noxious weeds causing significant environmental harm (eg. Sickle pod, Mimosa, Knob weed, Patterson's Curse to mention a few).[13] In fact, it is the very nature of some existing development activities (exempt from the wild river declarations) in high preservation areas which are either removing or slowing down the spread of these weeds.[14]These weeds are not always evident from aerial shots presented in the media. The image below shows one such example of a wild river over-run with introduced weeds.

---

11 Seethaler, S. (2009), *Lies, Damned Lies, and Science: How to Sort through the Noise around Global Warming, the Latest Health Claims, and Other Scientific Controversies*, FT Press.

12 The *2007 State of the Environment Report,* Legislation, p394. http://www.derm.qld.gov.au/environmental_management/state_of_the_environment/

13 In addition there is a noxious species of fish, Talapai, which also is prevalent in what DERM has classified as pristine/wild rivers.

14 For example, the Pongamia Tree Seed plantations around Lockhart River used to produce seeds from which biodiesel fuel is made.

It is the view of many living within these regions that the environmental intentions and sustainable development needs of Indigenous and remote people are not served by the *Wild Rivers Act 2005*. Environmental needs for such systems may be adequately met by either existing or amended environmental regulation, including higher level legislative protection, where and if required, and land use planning mechanisms at either the State or Commonwealth level. Thus we suggest the *Wild Rivers Act 2005* be revoked.

In essence then, the WRA is a marked shift away from the four environmental strategies underpinning the *Environmental Protection Act 1994* (EP Act) and the *Coastal Management Protection Act 1995* (CMPA). Both aim to achieve ecologically sustainable development through four environmental strategies:

1. Setting standards
2. Assessment and approvals;
3. Compliance; and
4. Enforcement and reporting.

The 2007 State of the Environment Report notes that all four environmental strategies work towards protecting, rehabilitating the condition of and reducing the pressures on the environment.

To answer whether it meets its objectives, it is necessary to distil the effects of the WRA from the effects of other legislation. This may be partly addressed by examining the impact of the various amendments to the 13 pieces of legislation through which the Wild Rivers legislation is implemented.

The main development activity, both before and after wild river declarations, appears to be related to mining activities. Wooded vegetation clearing by replacement cover shows that approximately two-thirds of this clearing is for mining activity, followed by 32% for "pasture", where "pasture" includes *"woody vegetation clearing for grazing, woody thinning, fodder clearing, rural residential, future urban land use and privately owned plantations (i.e. not replanted as plantations)".*[15]

The DERM's *State of the Environment Report 2007* states that:

> *"The 1.5 million hectares held under mining leases and licences (open-cut or underground mines) pose the greatest potential for environmental harm since such activities disturb relatively large areas of land compared with quarries. Process waste from mines, particularly tailing and acid rock drainage from metalliferous mines, can cause significant contamination of waterways."*

It is the very exemptions for mining activities which bring about the unusual situation where public support for the *Wild Rivers Act 2005* is based on a false understanding that it will stop mining. Despite the comparison between the relative harm from mining compared with quarries expressed by DERM above, under the WRA, extracting riverine rock or other material (Environmentally Relevant Activity 20) is prohibited, unless an allocation notice is held (under the Water Act 2000 or CPMA 1995) for which new allocation notices can only be issued (within non-tidal streams) for specified works or residential complexes.

The result of this is that 86 of the 100 applications approved by DERM (as stated in DERM's submission to the 2010 Senate Inquiry) were from mining companies (with many of these likely to be simultaneous approvals of a mining tenement, its environmental authority and associated riverine protection permits). It is the fact that the WRA does not stop such mining activity, while it prohibits many other activities such as extracting riverine rock or other material except for specified works or residential complexes (within non-tidal streams) which leads critics of the legislation to believe that:

> *"the conservation value of the Act is minimal while its economic choke-hold will further restrict Indigenous development."*[16]

Unlike these other statutes and associated environmental strategies, the WRA instead establishes a long list of prohibited activities within high preservation area (HPAs) and nominated waterways within preservation areas (PAs). Within these areas, activities are restricted to non-commercial activities or residential complexes.

In addition to the raft of environmental legislation, the Queensland Government introduced a specific-issue offset policy for biodiversity, aimed at achieving a net gain, or not net loss, outcome for the environment, or a specific economic value. These offsets are actions undertaken to counterbalance an impact that causes a loss of biodiversity values. One purpose or advantage of offsets as noted by Mark Cowan, lawyer for Blake Dawson is that:

---

15 Department of Environment and Resource Management, *Land Cover Change in the Cape York – Natural Resource Management Region*, Table 5.

16 Mr Stephen Brech, 30 March, 2010. Note that Mr Brech is a past member of The Wilderness Society and at the time of his submission, a member of the Queensland Greens.

"without offsets, a broad net gain objective is arguably in conflict with the principle of ecological sustainable development, which is an objective of both the IP Act [SPA] and the EPA."[17]

Those living in the region contend that the VMA and the EP Act, along with offsets are sufficient regulation to protect the rivers.

"No-development" Agenda?

The implementation of the WRA suggests that the Queensland Government has not got its priorities right. Ecologists and environmentalists likewise arrive at positions which fail to include the people affected by such positions in terms of the processes used (eg. lack of consent). Having excluded them from the process, they then fail to take into account their particular circumstances. Part of this problem stems from the fact that in implementing the *Sustainable Planning Act 2009*, there are no defined boundaries for applying the concept of 'ecological sustainability'.

The meaning of "ecological sustainability" listed in s.8 of the SPA is stated as follows:

"*Ecological sustainability is a balance that integrates –*

(a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
(b) Economic development; and
(c) Maintenance of the cultural, economic, physical and social wellbeing of people and communities."

By failing to apply these criteria at a regional level, those who support wild rivers legislation ignore that fact that local communities may be living in poverty and that it is the development needs of local communities which should take precedence in determining whether an activity is sustainable.

To the extent that this aspect is over-looked, the SPA, in assessing activities under the WRA, would not achieve its stated objective of ecologically sustainable development activities within Cape York Peninsula or the Gulf.

The WRA is in essence an inflexible piece of legislation, designed more to meet an anti-development agenda espoused by various environmental groups, rather than a piece of legislation aimed at ensuring safety guards exist against developers who potentially cause environmental harm by failing to meet the required standards.

While different environmental groups have changed their position and/or involvement with Wild Rivers over time, it is apparent that overall they have clearly had more success in Queensland than perhaps even they envisioned, as evident in an 1980 policy *Wild and Scenic Rivers Policy* of the Australian Conservation Foundation (ACF) which envisaged fewer rivers preserved within national parks:

---

[17] Cowan, M. *Is Queensland legislation ready for environmental offsets?*,, Blake Dawson, 3 December 2007, p2.

"1. The Australian Conservation Foundation (ACF) believes in the protection of all wild and scenic rivers and their catchments or corridors in their natural state, free from further development, so that:

(a) Remaining natural ecosystems are undisturbed and the natural flow is unimpeded;
(b) The benefits of natural river environments can be enjoyed by present and future generations;

2. The natural, scientific, aesthetic and recreational values of the remaining free-flowing rivers out-weigh their value for water resource development and water control purposes."

...

4. ...The essential character of a wild river is its natural condition...
5. ACF asserts that the few wild rivers in Australia are areas of international significance. In view of this status, their preservation within wild river national parks is an immediate priority.
6. Management plans are necessary to protect the rivers from visitor despoliation.
7. Management Guidelines
7.1 Wild River Area
(a) Land Use. No exploitative activities are permissible. The most stringent protective measures are essential. Recreational activities with minimal impact on the area will, at times, require some management in terms of the social and physical carrying capacity of the area;...
(c) Existing structures should be removed and roads should be closed to motorised vehicles. No new tracks or structures should be constructed in the area. Motor boats will be excluded."

This policy statement notes that the *Wild and Scenic Rivers Act* passed by the United States Congress in *1968* "set out the need for a balance between water resource development and conservation in the United States." It also states that whereas policy implementation in the USA was strongly biased towards the recreational use of the rivers, detailed application in Australia should place greater value on nature conservation.

Even though this policy statement is now quite dated, it is included here as it supports the views of some within the local communities that the WRA is more of an agenda for "no-development". The local communities believe that the existing environmental legislation is sufficient to protect the natural values of the river (ignoring for the moment that the fact that some would dispute the existence of these 'natural' values).

The approach adopted in Queensland goes much further than protection of river systems within other jurisdictions, both domestically and overseas. For example, in other jurisdictions within Australia wild river protection occurs primarily in conservation reserves, national parks or upon public land. In Tasmania, protection occurs primarily (96%) in reserve systems, in New South Wales protection is provided for only in national parks, whilst in Victoria,

protection has provisions that apply only to public land.[18] Consequently the potential for a negative impact is much greater.

It is also important to bear in mind that *only one quarter of one percent* of rivers within the USA are designated wild river areas under the *Wild and Scenic Rivers Act 1968*. Clearly the overall relative impact on development and well-being would differ greatly to the cumulative impact of successive declarations within CYP and Queensland more generally, where to date, 8 wild river areas have been declared with a further 9 basins proposed within CYP.[19]

In addition, s13 (b) of the *Wild and Scenic Rivers Act 1968* states that:

> *"Under the provisions of this Act, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation. Nothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."*

While compensation would be a more just outcome than the current lack of compensation, in the current context, it is our view that "meaningful jobs" which stem from entrepreneurialism and other development opportunities (across public, private, market and non-market sectors) will do much more for Indigenous well-being into the future.

Views of Urban Australia

In an attempt to ascertain the support for conservation or development in these regions by those living in other parts of Australia, Zander *et al* (2010) assess the benefits of different management strategies (i.e. strong conservation, strong development and development constrained by conservation) for three tropical rivers in northern Australia: the Daly, Mitchell and Fitzroy Rivers. They argue that failure to understand the value placed on tropical rivers by urban Australians across the whole country would underestimate the total economic value (TEV) of tropical rivers and at the same time would under-estimate the environmental costs of developing the rivers. Their study targeted six large urban areas where 60% of Australians live.

Before analysing the results, it is important to bear in mind a number of limitations with this approach. Firstly the response rate ranged from 27%-33%, of which 40% were highly interested in tropical rivers. Secondly, their study does not assess the costs of each type of management regime (where many of these costs would be foregone opportunities). And thirdly, the respondents themselves are not necessarily impacted by all of these costs (eg. foregone income).

Notwithstanding these limitations, their results, which were similar for all 3 catchments, suggest that:

---

[18] Queensland Parliamentary Research Brief, 2005, *Wild River Protections in Other Jurisdictions, pp 33-35,* Queensland Parliamentary Library cited in submission by Melissa Sinclair to the Senate Inquiry into the Wild Rivers (Environmental Management) Bill 2010.

[19] Note that in 2005, the WWF-Australian had a target for protecting 15% (i.e. 445,000 km) of rivers and creeks in Australia in natural or near natural conditions through dedicated wild river laws.

- "...*public support from the cities where the bulk of Australia's population lives now favours development that is strongly constrained by concerns for Aboriginal culture, and to a lesser extent, by environmental values;*
- *Support for unbridled agriculture is at best limited;*
- *...even among 'developers', there is a concern that the cultural values of rivers are not compromised;*
- *About half (50%) of the respondents favoured a balance of development and conservation, while about 40% were in favour of some form of conservation."*

The fact that the largest number of respondents *favoured a balance of development and conservation* is consistent with the views of locals living and working within CYP and the Gulf. Indeed, it is a "common sense" approach to what is a complex problem. The danger for us as a society lies in "common sense" being over-run by those who are over-zealous in putting forward their own "no-development" agendas.

Development as a human right

Under international law, government legislation, policies and processes should comply with the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognises:[20]

- the right of all peoples to …pursue their economic, social and cultural goals, and manage and dispose of their own resources. (Article 1);
- the right to work defined as the opportunity of everyone to gain their living by freely chosen or accepted work. Parties are required to take "appropriate steps" to safeguard this right, including …economic policies aimed at steady economic development and ultimately full employment. (Article 6). The work referred to in Article 6 must be decent work, where this is effectively defined as "just and favourable" working conditions. (Article 7)

Most recent thinking by UN agencies sees development as a realisation of international human rights.[21] Development empowers communities by promoting their participation in decisions on matters that affect them. Oxfam Australia note that "The idea of development is without meaning unless it is seen in terms of the impact on individual's and groups of people."[22] In order to achieve the long-term development aspirations of Indigenous peoples within these areas (i.e. CYP and the Gulf), it is important to bear in mind the sentiment captured by Professor Mick Dodson when he states:

> "*Policies and programs which rest primarily on a perception of need and powerlessness subtly reinforce powerlessness of the recipients who are seen as*

[20] Australia has ratified all UN conventions, and is yet to ratify the recent Optional Protocol on ICESCR that allows for individual complaints to the Committee on Economic, Social and Cultural Rights.

[21] Such thinking marked a major turn in 2003.

[22] Oxfam Australia, *Free and Equal – Towards Respect for the Human Rights of the Indigenous Peoples of Australia*., July 2009, Melbourne, Australia. This publication is part of The Diplomacy in Training Program – Making a Difference, founded in 1989 by HE José Ramos-Horta, 1996 Nobel Peace Laureate.

being given justice rather than receiving their rights. The recognition of entitlement is in itself an act of empowerment."

Part B Conclusions

The main criticism levelled at the *Wild Rivers Act 2005* in this section of our submission is that it is overly prescriptive with high levels of prohibitions, based on an "anti-development" agenda. This flies in the face of the United Nations *Declaration on the Right to Development* which states:

> *"…development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development …"*

Existing environmental regulation (in particular the VMA and the EP Act) along with the specific-issue biodiversity offsets policy, is either sufficient or has the potential to conserve the natural values of the river systems in these areas. Such potential may involve making certain amendments or broadening the scope of the offsets policy.

The Queensland Government's wild rivers legislation goes well beyond that of other jurisdictions, both domestically and overseas. In doing so, it has compromised "sustainable development" objectives.

Those who support the Wild Rivers legislation believe that the ecosystem values outweigh other considerations. However, given that achievement of ecologically sustainable development must take into account the economic diversity and living standards of those living within the region affected by the particular legislation, it appears that part of the problem stems from legislators not applying the SPA and the WRA within an appropriately defined regional boundary. This allows important regional economic, social and cultural issues to essentially be ignored.

The *Wild Rivers (Environmental Management) Bill 2010* in ensuring consent is first obtained would afford some degree of protection to the rights and aspirations for long term development among both Indigenous and non-indigenous residents within these regions.

Part C - The impact of existing legislation on the native title regime.

Native Title refers to the communal or individual rights and interest of Indigenous people possessed under their traditional laws and customs in relation to land and waters, through which the holders have a connection to the land or waters, and which are recognised by the common law.

Native title differs from Western forms of title in three significant ways:[23]

1. it is premised on the group or communal ownership of land, rather than private property rights;
2. it is a recognition and registration of rights and interests in relation to areas of land which pre-date British sovereignty, rather than a formal grant of title by government; and
3. it may co-exist with forms of granted statutory title, such as pastoral leases, over the same tracts of land.

As a codification within the Western legal framework, Native Title differs to Aboriginal systems of land tenure as perceived by Aboriginal groups themselves. The connection to country experienced by Indigenous people and the rights and responsibilities attaching to this connection continue to apply, irrespective of whether those rights and responsibilities are recognised by the common law and regardless of the legal title of the land.

Native Title is one of several categories of Aboriginal owned land on Cape York, each of which is associated with its own particular corporate landholding entity and each of which may also sustain coexisting native title rights over the same land. Approximately 17.5% of the landmass within the Cape York RATSIB Area has been determined as per the Native Title Determination Register, with a further 38.7% under claim as per the Native Title Determination Application Schedule.[24]

Whether Indigenous landholders can benefit economically from such opportunities, and develop economically, depends on the full recognition of legal title to their traditional lands and not just the native title rights. This raises questions around the extent to which society is prepared to acknowledge that the development needs of Indigenous peoples have moved beyond the strictly traditional rights. The importance of consent is highlighted, both in terms of access rights and from a cultural and social perspective (i.e. a matter of principle). Failure to work with, rather than against local values and practices, can invoke resistance from Indigenous groups.

Section 8 of the *EPBC Act* states that nothing in the *EPBC Act* affects the operation of s211 of the NTA 1993 - *Preservation of certain native title rights and interests*, where the classes of activity are defined as:

(a) hunting;
(b) fishing;
(c) gathering;
(d) a cultural or spiritual activity;

---

[23] Memmott, P. Blackwood, P. and McDougall, S. (2007)

[24] Data sourced from the Geospatial Specialist, National Native Title Tribunal, January 2011.

(e) any other kind of activity prescribed for the purpose of this paragraph.

The other rights recognised under Native Title vary from claim to claim, and depend on what the court has granted. Based on a number of determinations, one is able to ascertain what kind of rights on what kinds of land are generally recognised, with a tendency for claimants to ask for rights that they know will be recognised. Other rights may include some of the following:

- exclusive possession rights;
- access rights (i.e. controlling access of Aboriginal people or other people);
- rights to occupy and live on the land (eg. Build shelters and camp on the land); and
- rights to take flora, fauna and other resources.

The preamble to the Native Title Act 1993 (NTA) suggests that (e) above could provide the scope to allow for flexibility around these issues when it states:

> *"Their rights and interests under the common law of Australia need to be significantly supplemented…Governments should, where appropriate, facilitate negotiation …in relation to …proposals for the use of such land for economic purposes."*

There is clearly a great divide between those who limit native title rights to the explicit wording of (a) to (d) and those who seek to see its application to the modern day plight of Indigenous peoples. With respect to the changing types of development or economic activity over time, Noel Pearson poses a crucial question: "what continues" under the doctrine of continuity?[25] He makes the analogy about Englishmen building nuclear power stations as an "incident of this possession even though he could never imagine at that stage that was a right he wanted to enjoy."

Another layer of complexity which is relevant to this legislation is the definition of Native Title (s.223) and s.24MD (Treatment of acts which pass the freehold test) on which the Minister Mr Stephen Robertson states that "Even if a declaration could be considered to be a future act (which the Queensland Government asserts is not the case), it would be valid under the future act provisions of the NTA."[26]

The *Wild Rivers Act 2005* impacts on not only economic development, but other rights of indigenous people. For example, to the extent that access rights are impacted, then it is important to seek consent.

---

[25] Noel Pearson, The Australian, *Promise of Mabo not yet realised*, 29 May, 2010.

[26] For example, s.24MD (2) (ba) states that where "the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired" , then the Act permits both:

(i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and
(ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters;

The *Wild Rivers (Environmental Management) Bill 2010* proposes to operationalise the principle of consent through the *Native Title Act 1993,* honouring these connections in keeping with the definition of a 'right' as a '*just claim* or title, whether *legal, prescriptive or moral'*.[27] Sutton (2001) notes with respect to this definition, that a western cultural orientation of this definition is revealed in the word 'just'. An Aboriginal approach would be more likely in terms of the authorization of such claims on grounds of ancestral precedent words and practice and the stated knowledge of contemporary elders regarding the traditional law or customary dispute resolution procedures concerned.

The *Native Title Act 1993 (NTA 1993)* in recognising and protecting native title, is explicit in recognising the rights of native title holders and aboriginal land holders. Agreements made under the right to negotiate provisions and Indigenous Land Use Agreements, are the door for many Indigenous peoples' participation and engagement in the economy. The NTA makes provisions for binding legal agreements, including ILUAs to be made between native title groups and other parties like governments and corporations. Under s.86F of the Act, native title groups, the government and any other parties can decide to settle a claim through an agreement. Such agreements can include matters beyond strict native title issues. Brennan et al (2005) argue that this could be a vehicle for moving beyond native title towards more treaty-style negotiations, or alternatively function as a sub-agreement dealing with native title within the broader framework of a comprehensive agreement.

Section 87 allows the Federal Court to make orders consistent with the agreement and this may provide additional means of protecting the agreement once reached.

As argued by the Attorney General in March 2009:[28]

> *"native title is about more than just delivering symbolic recognition', it is an opportunity to create sustainable, long-term outcomes for Indigenous Australians."*

In a 2008 lecture *Beyond Mabo: Native title and closing the gap',* the Minister for Families, Housing, Community Services and Indigenous Affairs (Hon Jenny Macklin MP) argued that native title is critical to economic development, with properly structured property rights to land a key component in expanding commercial and economic opportunities. She argued that native title should reflect the changing needs and aspirations of Aboriginal and Torres Strait Island people in a market economy, and in doing so, lay down a challenge for policy makers.

It is important to consider native title alongside statutory land rights schemes under which Indigenous Australians have gained fee simple title or leases over areas of land.[29] In 1991, a

---

27 Macquarie Dictionary (1987: 1511) cited Sutton (2001), p29. This appears to be strongly supported in earlier submissions to the 2009 Senate Inquiry. For example, see submission by Stephen Brech.

28 Attorney-General, 'Rudd Government introduces legislation to improve the native title system' (Media Release, 19 March 2009). At: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_FirstQuarter_19March2009

29 Ibid p15.

form of inalienable Aboriginal freehold title was introduced in Queensland under the ALA. This provides for land to be granted on the basis of either 'traditional affiliation' or 'historical association', with the land title held by a land trust

Approximately 5% of CYP was Aboriginal freehold as of 2005, with this land held by 19 land trusts. Freehold may be granted as a result of either a claim process requiring claimants to prove their traditional or historical connection before a judicial tribunal, or by a more expedient administrative process referred to as 'transfer'. Both mechanisms rely upon the government to make the land available by gazettal.

Within Queensland, native title claims are resolved through a 'tenure resolution' process whereby the land needs and aspirations of Aboriginal people in a particular area may be settled through a combination of native title determination and the grant of Aboriginal freehold land under the *Aboriginal Land Act 1991*. This overcomes some of the limitations of native title to contribute to Indigenous economic and social development. For example, Brennan et al (2005) describe one such ILUA – the Western Cape Communities Co-existence Agreement between Comalco (a bauxite mining company), 11 traditional owner groups, 4 Aboriginal Community Councils, Cape York Land Council (the NTRB for the area) and the Queensland Government. The benefits negotiated by Aboriginal communities include:

- The progressive return of an unused mining lease land to Aboriginal ownership along with the transfer of a Comalco-owned pastoral station;
- $4million per year to a trust for community projects;
- Youth training and employment programs;
- Heritage protections;
- Business and outstation development.

The Queensland Government's Land Tenure Resolution Program has been running for approximately 10 years, with considerable tracts of land handed back to the Indigenous communities on Cape York, ensuring that "traditional owners" are given formal ownership of the land. Much of this has occurred within the last four years. To date, 4-5 pastoral lease properties have been handed back, with 13 planned in total. As a result of the handover, ILUAs with the State government are entered into and the land is handed over to a Land Trust. Fifty percent of the land becomes National Park (Cape York Aboriginal Plan) and 50% becomes Indigenous freehold land. For example, the McIlwraith Range saw 160,000ha created as National Park and 158,358ha as Indigenous freehold land.[30] The Indigenous communities work with the Queensland Park and Wildlife Service to develop a management plan, including ranger activities and camping grounds.

In time, it is intended that ALA freehold will replace DOGIT lands, which were introduced in Queensland in 1984 to create protective reserves, missions and government settlement areas. Under s.88 of the ALA, mining companies pay royalties to the Queensland government. However, after the transfer (which has been the intention as far back as 1991), a certain percentage will go to the PBC.

[30] Based on personal communication with a representative of the Department of Environment and Resource Management.

There are also a number of Aboriginal-owned pastoral leases within CYP, with these often held by Aboriginal corporations formed under the *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (CATSIA).[31]

In enabling the Court to make orders that cover matters beyond native title, the *Native Title Amendment Act 2009* requires that parties agree on these further matters. Examples of matters other than native title that may be covered by agreement include matters such as:[32]

- economic development opportunities;
- training;
- employment;
- heritage;
- sustainability;
- the benefits for parties; and
- existing industry principles or agreements between parties or parties and others that might be relevant to making orders about matters other than native title.

This is aimed at creating *"a more flexible native title system and one that produces broad benefits to Indigenous people and certainty to stakeholders."*[33]

Impact of existing environmental legislation and legislation in relation to mining

Under the *Vegetation Management Act 1999* and the proposed ETS, carbon can only be traded where it is unprotected. Any land cleared in the past can continue to be cleared. Freehold land owners can agree not to clear the land and in turn, receive a return for storing carbon. However, those who currently have uncleared land are not in a position to receive a return for storing carbon. Given that a greater proportion of the population in CYP is Indigenous, this suggests that the Indigenous population on CYP is disproportionately burdened by this legislation.

Under the *Mineral Resources Act 1989*, several processes may operate to deal with native title issues associated with applications for mining and exploration tenements.[34] These are:

- Indigenous Land Use Agreements (ILUAs) under the NTA;
- Right to Negotiate procedures (RTNs) including the Expedited Procedure and s.31 agreements under the NTA; and
- Alternative State Provisions (ASPs) ;

---

31 Prior to July 2007, the relevant legislation was the Aboriginal *Councils and Associations Act 1976* (Cth) (ACAA). This is the same legislation under which native title Prescribed Body Corporates are incorporated, whereby the native title community interacts with the wider economic and legal system through such corporate entities. Such entities are responsible for both protecting and managing native title.

32 Ibid, paragraph 1.10

33 The Parliament of the Commonwealth of Australia, House of Representatives, Native Title Amendment Bill 2009, Explanatory Memorandum, 2008-09, Schedule 2 – Powers of the Court.

34 The following discussion lends heavily from a series of Native Title Publications by Arthur Allens Robertson between 2003 and 2010.

Since April 2003, the Queensland Government has adopted the *'right to negotiate' procedures under the NTA* when granting mining tenements. Under the 'right to negotiate' regime, explorers are able to apply for exploration permits under the *expedited procedure* under the *Native Title Act 1993* (without proceeding through the 'right to negotiate' procedure); however, exploration applicants must accept the *native title protection conditions* (NTPCs) as a condition of the permit. Other aspects of reverting back to the Commonwealth regime include:

- Mining tenement applications now need to rely on the State to initiate the 'right to negotiate' procedure (as opposed to it automatically being initiated when lodging the application); and
- The National Native Title Tribunal rules on disputes between mining tenement applicants and native title parties (instead of the former Queensland Land and Resources Tribunal).

The expedited procedure potentially allows for exploration tenements to be granted without proceeding through the right to negotiate procedure where the exploration is asserted to have minimal impact on native title and cultural heritage. Such expedited procedures are only used where the explorer has accepted the NTPCs, which are for the most part standard non-negotiable conditions where native title is an issue. Key aspects of these NTPCs include procedures which must be followed before exploration begins on the land and are heavily focused on cultural heritage protection. For certain low impact activities (eg. aerial surveys, geological and survey work, sampling by hand methods and drilling on areas previously cleared by the explorer), there is no requirement on the explorer to conduct a field inspection for, or to monitor such "Agreed Exploration Activities". Issues around dispute resolution, costs to be borne by the explorer and strict time frames for undertaking certain actions are also dealt with in NTPCs.

Other options (as alternatives to the expedited procedure) to obtain exploration permits (from 1 July 2003) include adopting the State Indigenous Land Use Agreement (ILUA) or a regional ILUA or to negotiate one's own ILUA.[35] NTPCs are believed to provide the following advantages;

- NTPCs are available throughout the State, whereas State ILUAs are only available where the native title parties have accepted it;
- NTPCs afford more certain timeframes for the performance of activities; and
- There is no need for field inspections or monitoring for low impact activities.

The NTPC process provides a level of certainty and protection for both parties. If the native title party (NTP) is not happy with the NTPC for some reason it has the opportunity to negotiate an individual ILUA or accept the State ILUA if the NTP believes these would provide more appropriate protection. Further, if the NTP does not believe that the expedited procedure applies (i.e. usually because the NTP argues that the exploration will have a significant impact for some reason), the NTP can lodge an objection to the use of the expedited procedure and seek an inquiry on the question of whether it applied in the circumstances. If the inquiry upholds the objection then the right to negotiate will apply.

[35] The latter is likely to be impractical for most exploration projects.

The *Aboriginal Land Act 1991 (Qld)* aims to clarify the grounds on which Aboriginal peoples can claim and be granted freehold or perpetual leasehold title to land, or a lease for a term of years. The Act establishes four categories of land:

1. Transferred (granted) land for which there is no claim by Aboriginal peoples.
2. Transferable (is to be granted) land for which there is no claim by Aboriginal peoples;
3. Granted land for which there has been a claim by Aboriginal peoples;
4. Claimable land for which there is a claim by Aboriginal peoples.

Transferable land is granted by the Minister, where certain grantees are appointed by the Minister as trustees for the benefit of Aboriginal people. (eg. Aurukun Shire lease land; Mornington Island Shire lease land; Aboriginal reserve land; and certain land under the Land Act 1994). The Governor-in-Council may grant such land in fee simple (freehold). *Transferred land* is transferable land granted for the benefit of Aboriginal people without a claim being made under the Act.

Claimable land is Crown land declared to be available by the Governor-in-Council. It may also be "transferred land". Generally, claimable land is land in which only the Crown has an interest, although Crown land may still be claimable land even if another party has a mining interest over it. Aboriginal people must claim claimable land on behalf of their group on the grounds of:

- Traditional affiliation;
- Historical association;
- Economic viability; or
- Cultural viability.

The *Aboriginal Land Act 1991 (Qld)* established a Land Tribunal to consider claims, and where such claims are established, it recommends to the minister that a freehold or leasehold title be granted. The minister then directs the Registrar of Titles to prepare the appropriate deed of grant (either in fee simple or leasehold). As with the transferred land, the minister appoints the grantees as trustees for the benefit of Aboriginal peoples. The Govenor-in-Council may grant such land in fee simple, a lease in perpetuity or a lease for a term of years. Deeds of grant of granted land, transferred land and an Aboriginal lease must contain a reservation to the Crown of all minerals and all petroleum on or below the surface of the land.

Existing mining interests in transferable or granted land are preserved.

With regards to the creation of *new* mining interests, the Aboriginal grantees of land under the Act may consent to the creation of a mining interest in the land and may enter into an agreement with the Crown (State or Commonwealth) in relation to extraction and sale of quarry material above, on or below the land. The grantees are required to explain to the Aboriginal people concerned with the land the nature, purpose and effect of the proposed consent or agreement. They must give the people adequate opportunity to express their views and must obtain their general assent to the arrangements. However, grantees have no absolute veto over a mining application.

All land granted or leased under the *Land Act 1994* is subject to the reservation of minerals, petroleum and gas in the Crown. For each deed of grant or lease of unallocated State land,

there is also a right of access for prospecting, exploring or mining for minerals and for exploring for and obtaining petroleum, including access for pipelines etc necessary to extract petroleum. Note also that the grant of land (leases) under the *Local Government (Aboriginal Lands) Act 1978* (Qld) for the creation of a local government area at Aurukun and Mornington Island does not affect the Crown's mineral rights, and all gold, minerals and petroleum are reserved to the Crown,

Generally, for the purposes of the *Mineral Resources Act 1989 (Qld),* all land which is transferable, transferred and claimable is treated as a 'reserve' unless there is already a mining interest on claimable land.[36] In the latter case, the land is not treated as 'Aboriginal land' for the purposes of the existing mining interest.

The grantees of the land in relation to Aboriginal land (i.e. land other than that subject to an Aboriginal non-transferable land lease) are entitled under the *Mineral Resources Act 1989* or the *Petroleum Act 1923* to receive out of money appropriated by parliament, a percentage of the royalty amount, which is to be applied for the benefit of Aboriginal people for whom the land is held, particularly those that are affected by the activities to which the royalty amount related. The percentage of royalties the grantees are entitled to decreases, as the royalty amount paid increases (i.e. 50% of each $1 up to $100,000 down to 5% for each $1 more than $100,000).

Under the *Nature Conservation Act 1992* (Qld), the designation of national parks, conservation parks and world heritage management areas restrict access to and use of certain areas. All natural resources in these areas are the property of the State. Tenements under the *Mineral Resources act 1989* may not be granted for these areas.

Therefore, under some protected areas (eg. Nature Refuges), the native title land holders could not agree to mining without the consent of the EPA. Likewise, under the MRA 1989, in relation to land that is a 'reserve', the various mining interests require the owner's consent (usually the owner or the Governor-in-Council), with the Land Court hearing and making recommendations to the minister before seeking the consent of the Governor-in-Council if the owner's consent is not obtained for mining claim applications. In effect the government is treating consent like "permission" when it suits its purpose. However, in implementing Wild Rivers legislation, the Queensland government is choosing to treat consent differently, opting instead for consultation.

In 2004, the Queensland Government introduced legislation that produced significant changes to the regulation of the protection of Indigenous cultural heritage. The aim of the *Aboriginal Cultural Heritage Act (2003)* and the *Torres Strait Islander Cultural Heritage Act (2003)* (Qld) is to put in place a system for the preservation and protection of areas and objects which are of significance to Indigenous people. The Act makes it mandatory for all new major developments and mines (which have an EIS associated with them) to carry out surveys and assessments of cultural heritage in the area of the proposed development and subsequently prepare Cultural Heritage Management Plans (CHMPs) detailing how any cultural heritage in the area will be protected. The legislation also established a 'duty of care'

[36] That is, land granted in trust for Aboriginal or Torres Strait Islanders is treated as 'reserve' land for the purposes of the *Mineral Resources Act 1989 (Qld).*

which puts a positive obligation on any person carrying out an activity to take all reasonable and practical measures to ensure that the activity does not harm Aboriginal cultural heritage. CHMPs must be prepared in consultation with representatives of relevant Indigenous groups, and if approved, the CHMPs are binding upon the developer/miner. These Acts promoted the protection of Aboriginal cultural heritage to levels that far exceeded the position before the legislation. The legislative review undertaken in early 2010 brought forward a number or recommended amendments. This includes amongst others, a recommendation that where there are multiple Aboriginal parties (eg. an area of overlapping native title claims or a situation where there are no claims but multiple individuals who have a traditional connection to the area), that a CHMP must be negotiated and agreed with all of the Aboriginal parties for the area

Native Title Hurdles for Indigenous Development Aspirations

However, as elaborated by Collings (2009), there are still many hurdles to he overcome if the *Native Title Act 1993* is to deliver more sustainable, long-term outcomes from economic development:[37]

- Native title is not conducive to 'development' and is in most cases an inferior form of land title. Native title is not title to land as such, but a bundle of rights that can each be extinguished. This means that native title holders may be granted rights to do only certain things on land, not gain the title to the land itself. Clearly, this may limit economic development by making such development more difficult (with perhaps certain types of economic development not possible without legal title). Grant of exclusive possession is possible, but only where there is no prior extinguishment by grant of other interests on the land, or where prior extinguishment has been disregarded under s47, 47A or 47B of the NTA.[38] Without title to land, 'there is no entitlement to participate in the management of land, control access to land, or obtain benefit from the resources that exist on the land'. Other forms of Aboriginal title such as Aboriginal freehold under land rights legislation enables greater opportunity for development ;
- Classifying native title rights as 'traditional' inhibits the economic use of such rights, and stifles the development trajectory Indigenous peoples are entitled to pursue as of right. Indigenous people have to rely on a combination of different systems of state land rights to ensure economic development occurs;
- There is an often-touted view that economic development is somehow contradictory to traditional land use, and what it means to be Indigenous. There is also a view that development threatens conservation objectives;
- The length of time it takes to obtain native title determinations;
- The non-exclusive nature of many determinations;
- Indigenous peoples have sometimes been marginalised from development outcomes on their lands;
- On the rare occasion a native title claim succeeds, the rights and interests are limited over native title lands. Furthermore, common law recognition through litigation is difficult;

---

[37] Collings, N (2009), Native title, economic development and the environment, in *Reform*, The Australian Law Reform Commission, No. 93. Neva Collings is an Indigenous Solicitor at the Environmental Defender's Office New South Wales

[38] The formulation of native title as a bundle of rights was established in the High Court in *Western Australia v Ward*. See *Ward v Western Australia* (1998) 159 ALR 483. Legal title is considered critical to leveraging outcomes from property. Yet this is obstructed by the onerous requirements of proving native title and thwarted by the bundle of rights approach that may not confer exclusive possession.

- Claimants have to show that they have existed as a community continuously since British acquisition and continued to observe their laws and customs;
- Traditional laws and customs are transmitted orally, which means evidence may be inadmissible or restricted under the hearsay rule. This test means it is far more difficult to prove native title in south-east and southern parts of Australia, where dispossession occurred first; and
- The economic effect of the legal dictum of extinguishment is to permit the expansion of non-Indigenous interests in land and erode the Indigenous land base.

The Cape York Institute also notes that while exclusive native title grants rights and interests for biodiversity offsetting, with non-exclusive native title, indigenous interests are not able to independently enter into biodiversity offsetting agreements. Where native title overlaps with other forms of Aboriginal tenure, reaching agreement between the different title holding bodies in relation to establishing offsets will also potentially be an obstacle.

The *Wild Rivers (Environmental Management) Bill 2010* affords important protection to Indigenous rights. Following the release of the 2005 report *Structures and Processes of Prescribed Bodies Corporate,* the Australian Government accepted in full all of the recommendations with the exception of Recommendation 5. Under this recommendation, PBCs should only consult and obtain the consent of native title holders on matters concerning the surrender of native title rights and interests in relation to land and waters. However, the Government considers that this would be disadvantageous to common law holders of native title and believes that "the requirement to consult and obtain the consent of native title holders in relation to *all native title decisions* should generally be retained."[39] This suggests broad support for the intent of the *Wild Rivers (Environmental Management) Bill 2010).*

Section 203 BB(1) of the NTA provides that the functions of native title representative bodies include assisting registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in:

> "*consultations, mediations and negotiations involving future acts, ILUAs and other agreements in relation to native title".*[40]

The *Native Title (Prescribed Bodies Corporate) Regulations 1999* describe the functions of prescribed bodies corporate in areas where there has been a determination that native title exists as including:

> *"consulting with, and obtaining the consent of, the common law holders of native title before making a 'native title decision' , including a decision agreeing to do an act that would affect their native title rights and interests."*[41]

---

39 [insert ref to Facsia state on their website:]

40 Neate, g. (2010), *Using Native Title to Increase Indigenous Economic Opportunities,* National Native Title Tribunal, Speech delivered 6 December, 2010, p 37

41 Ibid. P37

It is interesting to note that the *Wild Rivers (Environmental Management) Bill 2010* restores some sense of justice given the fact that the *Wild Rivers Act 2005* and the raft of associated environmental legislation goes against the spirit of the Cape York Heads of Agreement signed in 1996 to which the Queensland Government is a signatory. Under this agreement:

> *"5. All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interest in the area.*
>
> *13. The parties agree that areas of high conservation and cultural value shall be identified by a regional assessment process according to objective national and international criteria. There shall be an independent review acceptable to all parties in the case of dispute as to whether the values are consistent with the criteria. Where such areas are identified, the landholder shall enter into appropriate agreements to protect the area under State or Commonwealth provision which may include World Heritage listing. As part of such agreements, funds shall be provided for management of the area, monitoring of agreements and equitable economic and social adjustment.*
>
> *14. There shall be no compulsory acquisition of private leasehold or freehold land, without prior negotiation with the landowner, and unless all reasonable avenues of negotiation, including the agreements detailed in clause 13, are exhausted.*
>
> *15. The purchase of land for the protection and management of cultural and environmental values shall only take place as land becomes available commercially.*
>
> *16. The parties support the establishment of a fund for the purpose of purchasing land with identified high environmental and cultural values by the Commonwealth Government. The fund also shall contain funds for effective management of land purchased by the fund."*

Restricting new development through extensive prohibitions and restrictions on high preservation areas and nominated waterways in preservation areas has bypassed the possible course of action envisaged by those who struck this agreement. This suggests that the Queensland Government, at least morally, if not legally, should honour the agreed principles in the *Wild Rivers (Environmental Management) Bill 2010.* To not do so shows a total disrespect for the Indigenous peoples by ignoring this earlier agreement.

Part C conclusions

The *Wild Rivers (Environmental Management) Bill 2010* affords important protection to Indigenous rights. To the extent that access rights are impacted, then it is important to seek consent. The *Wild Rivers (Environmental Management) Bill 2010* proposes to operationalise the principle of consent through the *Native Title Act 1993,* honouring these connections in keeping with the definition of a 'right' as a '*just claim* or title, whether *legal, prescriptive or moral'.*

Following the release of the 2005 report *Structures and Processes of Prescribed Bodies Corporate,* the Australian Government accepted in full all of the recommendations with the exception of Recommendation 5. Under this recommendation, PBCs should only consult and obtain the consent of native title holders on matters concerning the surrender of native title rights and interests in relation to land and waters. However, the Government considers that this would be disadvantageous to common law holders of native title and believes that "the

requirement to consult and obtain the consent of native title holders in relation to *all native title decisions* should generally be retained."[42]

A 'consultative approach' does not equate to consent. While there may be some degree of debate about the extent to which undertaking consultations in good faith is sufficient, this "inconsistency" should perhaps be challenged.

While there is clearly disagreement about what rights are captured by "native title", recent trends towards greater flexibility and scope for native title determinations suggests that continuing to define them as "traditional interests" is inconsistent with the view expressed by the Attorney General in March 2009 that *"native title is about more than just delivering symbolic recognition – it is an opportunity to create sustainable, long-term outcomes for Indigenous Australians."* Based on this broader view, we believe that consent is important.

[42] http://fahcsia.gov.au/sa/indigenous/progserv/land/Pages/prescribed_bodies_corporate.aspx]

References

ABS *Regional Population Growth*, Australia, Catalogue Number 3218.0 and a Concordance File of 2009 SLA to 2006 Indigenous Region (IREG).

Arthur Allens Robertson Lawyers, Native Title Publications, Occassional Newsletters, 2003 to present.

Attorney-General, 'Rudd Government introduces legislation to improve the native title system' (Media Release, 19 March 2009). http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_FirstQuarter_19March2009

Australian Government Attorney Generals Department. (n.d.). *Structures and Processes of Prescribed Bodies Corporate 2005*. http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Prescribedbodiescorporate(PBCs) or http://fahcsia.gov.au/sa/indigenous/progserv/land/Pages/prescribed_bodies_corporate.aspx

Australian Government ComLaw. (n.d.). *Native Title Act 1993*

Australian Government ComLaw. (n.d.). *Wild Rivers (Environment Management) Bill 2010*. Australian Government ComLaw: http://www.comlaw.gov.au/Details/C2010B00016

Australian Productivity Commission. (n.d.). *Impacts of Native Vegetation and Biodiversity Regulations 2004*. http://www.pc.gov.au/projects/inquiry/nativevegetation/docs/finalreport

Brech, S. (2010), *Submission to Senate Legal & Constitutional Committee – Wild Rivers,* No.17

Brennan, S. Behrendt, L. Strelen, L. and Williams, G. (2005), *Treaty,* The Federation Press, Australia.

Collings, N (2009), Native title, economic development and the environment, in *Reform*, The Australian Law Reform Commission, No. 93.

Cowan, M. (2007), *Is Queensland legislation ready for environmental offsets?,,* Blake Dawson, 3 December 2007, p2.

CBD. (n.d.). *Convention on Biological Diversity*. http://www.cbd.int/

Dept. of Sustainability, Environment, Water, Population and Communities. (n.d.). *Environment Protection and Biodiversity Conservation Act*. http://www.environment.gov.au/epbc/

Department of Environment and Resource Management (DERM), *Land Cover Change in the Cape York – Natural Resource Management Region,* Table 5.

Department of Environment and Resource Management (DERM), *State of the Environment Report 2007*, http://www.derm.qld.gov.au/environmental_management/state_of_the_environment/

Ehrlich, P. R., and Ehrlich, A. H. (2004). 'One With Nineveh: Politics, Consumption, and the Human Future.' (Island Press: Washington, DC.).

Fincke, A. (2009), *Applying a Rights-Based Approach to Indigenous Peoples in Conservation*, speech presented at the Eigth Session of the UN, Permanent Forum on Indigenous Issues (UNPFII) New York 18-29 May

Fisher, B., Turner, R. K., and Morling, P. (2008). Defining and classifying ecosystem services for decision making. Ecological Economics 68, 643–653. doi: 10.1016/j.ecolecon.2008.09.014.

Gowdy, J. (2010) The evolution of social and moral behaviour: evolu- tionary insights for public policy. Ecological Economics 69, 753–761.

MA (Millennium Ecosystem Assessment) (2005). 'Ecosystems and Human Well-being: Biodiversity and Synthesis.' (World Resource Institute: Washington, DC.).

Memmott, P., Blackwood, P. and McDougall, S. 2007 'A Regional Approach to Managing Aboriginal Land Title on Cape York', in Weiner, J.F. and Glaskin, K. (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, Asia-Pacific Environment Monograph 3, ANU E Press, The Australian National University, Canberra, pp.273-297.

Macklin, J. MP. (2008). *Beyond Mabo: Native title and closing the gap*. Retrieved from NSW Bar Association: http://www.nswbar.asn.au/circulars/macklin.pdf

National Native Title Tribunal, Geospatial Specialist, Date on determinations and claims on Cape York Peninsula.

Neate, g. (2010), *Using Native Title to Increase Indigenous Economic Opportunities,* National Native Title Tribunal, Speech delivered 6 December, 2010, p 37

Office of the United Nations High Commissioner for Human Rights. (n.d.). *Committee on the Elimination of Racial Discrimination,* August 2010. http://www2.ohchr.org/english/bodies/cerd/

Oxfam Australia, *Free and Equal – Towards Respect for the Human Rights of the Indigenous Peoples of Australia*., July 2009, Melbourne, Australia.

Pearson, N., The Australian, *Promise of Mabo not yet realised*, 29 May, 2010.

Qld Government. (n.d.). *Aboriginal Cultural Heritage Act (2003)* .
http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2003/03AC079.pdf

Qld Government. (n.d.). *Aboriginal Land Act 1994*.
http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/AborLandA91.pdf

Qld Government. (n.d.). *Animal Management (Cats and Dogs) Act 2008*.
http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2008/08AC074.pdf

Qld Government. (n.d.). *Coastal Management Protection Act 1995*

Qld Government. (n.d.). *Environmental Protection Act 1994*

Qld Government. (n.d.). *Minerals Resources Act 1989*. Retrieved from
http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/M/MineralReA89.pdf

Qld Government. (n.d.). *Nature Conservation Act 1992*. Retrieved from
http://www.legislation.qld.gov.au/legisltn/current/n/naturecona92.pdf

Qld Government. (n.d.). *The Land Act 1994*. Retrieved from
http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/L/LandA94.pdf

Qld Government. (n.d.). *Torres Strait Islander Cultural Heritage Act (2003)*. Retrieved from http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2003/03AC080.pdf

Qld Government. (n.d.). *Vegetation Management Act 1999* . Retrieved from http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/V/VegetManA99.pdf

Qld Government. (n.d.). *Water Act 2000*. Retrieved from http://www.legislation.qld.gov.au/legisltn/current/w/watera00.pdf

Queensland Parliamentary Research Brief, 2005, *Wild River Protections in Other Jurisdictions, pp 33-35,* Queensland Parliamentary Library

Ratnapala, S. (2009), *Constitutional Vandalism under Green Cover*, Speech to Property Rights Australia.
http://propertyrightsaustralia.org/speeches/suri-ratnapala/

Seethaler, S. (2009), *Lies, Damned Lies, and Science: How to Sort through the Noise around Global Warming, the Latest Health Claims, and Other Scientific Controversies*, FT Press.

Sinclair, M. (2010), *Submission to Senate Legal & Constitutional Committee – Wild Rivers,* No.28

Sutton, P. (2001), Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title, *National Native Title Tribunal Occasional Papers Series*, No. 2.

The ACT Natural Resource Management Council. (n.d.). *Australia's NRM Governance System: Foundations and principles for meeting future challenges*. http://www.actnrmcouncil.org.au/publications

The IUCN. (n.d.). *The IUCN World Conservation Congress*. Retrieved from http://www.iucn.org/congress_08/

The Parliament of the Commonwealth of Australia, House of Representatives, Native Title Amendment Bill 2009, Explanatory Memorandum, 2008-09, Schedule 2 – Powers of the Court.

UN. (2007). *The United Nations Declaration on the Rights of Indigenous Peoples*. http://www.un.org/esa/socdev/unpfii/en/drip.html

Western Australia v Ward. See *Ward v Western Australia* (1998) 159 ALR 483.

Zanda, K. Garnett, S. and Straton, A. (2010), Trade-offs between development, culture and conservation – Willingness to pay for tropical river management among urban Australias in *Journal of Environmental Management,* vol 91, pp 2519-2528.